Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1996

FRANCES D. BURNS,

Petitioner,

v.

AAF-MCQUAY, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Circuit erred in determining that an employee who had presented enough evidence of discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et. seq.*, to withstand summary dismissal upon evidence that she was singled out for offensive conduct by her supervisor failed under the same evidence to offer sufficient proof of constructive discharge?

PARTIES BELOW

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[1] AAF-McQuay, Inc. is a wholly owned subsidiary of AAF-McQuay Group, Inc., which is a wholly owned subsidiary of OYL Industries BHD, which is a publicly held corporation whose shares are traded on the Kuala Lumpur stock exchange.

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Decision of the United States District Court, Western District of Virginia, The Honorable James H. Michael: Frances D. Burns v. AAF-McQuay, Inc., unpublished (October 6, 1995) (No. 94-00049).

Decision of the Magistrate Judge for the United States District Court, Western District of Virginia, The Honorable B. Waugh Crigler: Frances D. Burns v. AAF-McQuay, Inc., unpublished (September 6, 1995) (No. 94-00049).

Statement of Jurisdiction

This case arose under the Age Discrimination in Employment Act, 29 U.S.C. Section 621, *et seq.*, ("ADEA" or "the Act"). The Magistrate Judge had jurisdiction to hear the Motion for Summary Judgment filed by AAF-McQuay, Inc. pursuant to 28 U.S.C. Section 636 (b) (1) (B) and the United States District Court had jurisdiction to hear the Motion to Reconsider,

also filed by AAF-McQuay, Inc., pursuant to 28 U.S.C. Section 1331. The U.S. Court of Appeals for the Fourth Circuit had jurisdiction to hear the appeal therefrom pursuant to 28 U.S.C. Section 1291. The decision of that court was rendered on September 23, 1996.

By way of certiorari under 28 U.S.C. Section 1254 (1), this Court has jurisdiction to review the decision of the Court of Appeals for the Fourth Circuit.

Statutory Provisions

29 U.S.C. Section 623 (a) (1):

It shall be unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

STATEMENT OF THE CASE

This matter involves a claim by Frances Burns of age discrimination and constructive discharge by her employer, AAF-McQuay, Inc. (hereinafter "McQuay" or "the company"). The case was first heard by the Magistrate Judge for the United States District Court, Western District of Virginia, Harrisonburg Division on McQuay's Motion for Summary Judgment. The Magistrate Judge recommended that the motion be denied, citing unresolved issues of material fact.

McQuay objected to the report and recommendation issued by the Magistrate Judge, and the matter was then heard *de novo* by The Honorable James H. Michael, Jr., District Judge for the United States District Court, Western District of Virginia, pursuant to 28 U.S.C. Section 1331, who granted McQuay's motion. Burns then appealed the district court's opinion to the U.S. Court of Appeals for the Fourth Circuit, where the panel rendered a unanimous opinion that Burns had presented sufficient evidence of age discrimination to let the case go forward to trial, but that her constructive discharge claim failed as a matter of law.

Frances Burns was employed by the company for thirty years. In 1978, Burns assumed her position with the company as Human Resources secretary. Until 1991, Burns' supervisor in the Human Resources department was Chuck Welsh. In 1991, Gary Alderson replaced Welsh as Human Resources manager and was Burns' supervisor for one year until he was replaced by Stephen B. Horney. Burns worked for Horney for approximately one year. Horney was Burns' supervisor at all times relevant to this matter.

According to Welsh and Alderson, Burns was an excellent employee and her job was "definitely not" in jeopardy because of her performance. Contrary to Horney's later claims, Burns says that he had few

complaints about her performance.[1] On one occasion he reprimanded Burns for failing to make arrangements for an arbitration meeting. Burns denies that Horney assigned this task to her. The only other complaint from Horney came in December 1993 when Horney returned to Burns a letter which contained a single typographical error. This is the *first* and *only* specific instance of a typographical error that Horney can recall. Burns denies that, other than these two incidents, Horney ever expressed dissatisfaction with her performance. Horney admits that at the end of 1993, just before Burns was demoted, she was performing at a "provisional" to "good" level. Despite the fact that she was performing at this level, Horney decided to demote her.

During the months immediately prior to her demotion and termination, Burns recalls several incidents in which Horney revealed his concern with her age and his desire to see her retire. In December 1993, Horney told Burns, "You're 65 years old. You're 65 years old. You are walking around like a ten year old child." Horney also brought up the issue of Burns' plans for retirement in that same conversation, at which time Burns advised him that she planned to continue working until her husband

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[1]Despite corporate policy to the contrary, there was no written record of performance deficiencies in Burns' personnel file. Although Horney produced a list of alleged deficiencies after litigation ensued, he admitted that more than half of the alleged problems were not discovered until *after* Burns' departure.

retired. On another occasion, Horney also told Burns that she "did not fit into his group." When Burns asked Horney what he meant by that remark, Horney "had no comment." Even at his deposition, Horney espoused old age stereotypes. He testified that Burns' alleged typing problems "would probably link with a loss of skills." When questioned as to the possible cause of skill loss, Horney opined, "I don't know . . . . Why do you lose your memory? Why do you have problems reading?"

In addition to Horney, other employees at the Staunton facility expressed a not-so-subtle desire to remove Burns from her position as Human Resources secretary, indicating through their comments that she was too old to do the job. Both Alderson and John Laub, a former corporate level employee, identify one of the company's former supervisors, allegedly a "peer" of the Human Resources manager, as having discussed a desire to terminate Burns because of her age. Alderson states that a focus factory manager, who was one of the most senior supervisors at the plant, told him one day that "he would like to get Frances out of that position and get someone else in there younger."

Although Horney only criticized Burns' performance on two occasions, their relationship was strained. Horney treated the other employees in the

Human Resources department better than he treated Burns. Horney was arrogant to Burns, he was disrespectful, and he was hostile to her. And although Horney was at times a volatile person, even Nan Eppard, Horney's colleague, admits that Horney treated Burns more harshly than he did the other employees. Eppard concedes that Horney was also "more critical" of Burns than the other employees. In contrast, Donna Brown, who replaced Burns as Human Resources secretary, describes Horney's treatment of her and other employees in a much different way. She says that Horney is "friendly," "patient," and "treats his employees with respect." For his part, Horney says that he had a "good" relationship with Burns, and that he "had no dislike or anything" for her.

Shortly before her demotion to an entry-level position of switchboard operator, Burns overheard Eppard refer to her as being "in the protected group." Eppard admits to making this comment to Horney. According to Eppard, in late 1993 she and Horney discussed Burns' plans for retirement. Horney expressed to Eppard his concerns about where "Frances could fit into that picture" for the future. Later, during a similar conversation, Eppard commented to Horney that they must be careful what they did with Burns because she was in "the protected group."

After her transfer to the switchboard, Horney intensified a pattern of unwarranted harassment against Burns even though her work station was now physically removed from him. In less than one month's time, Horney initiated three unprovoked attacks on Burns. On one occasion Horney chastised Burns for reading the newspaper at the switchboard, even though she was reading the paper on her own time before the switchboard opened. On another occasion, Horney admonished Burns for failing to open the switchboard by 7:00 a.m., when in fact she had started her work day early and had opened the switchboard at 6:45 a.m. And one day following Burns' return from lunch, Horney berated Burns in front of two salesmen who were standing in the lobby and told her that "he would fire me down here just like he fired me from the Human Resources Department." Apparently, Horney made a scene, because the salesmen "stopped their conversation to hear what was being said." The event that triggered Horney's wrath was, according to Burns, her return from lunch. Burns had no expectation at that point that their relationship would improve and feared that termination was imminent.

Following the continued harassment by Horney after her transfer to the switchboard, Burns became depressed. She found it increasingly difficult to perform

her job. Based upon Horney's comments and behavior, she felt like Horney was trying to force her out. Burns was unable to resolve the problem internally because the company had made Horney its EEO compliance officer and had offered no alternatives for making complaints to other management personnel if the supervisor complained of was Horney. Finally, she concluded that Horney demoted her so that she would resign or retire. After Horney demoted her and then deliberately made her working conditions intolerable, Burns was forced to resign. She was then sixty-five years old.

In an Opinion written by Judge Ervin, a panel of the Court of Appeals reversed the decision rendered by Judge Michael and remanded for trial the question of whether Burns was demoted illegally, but affirmed Judge Michael's decision with respect to Burns' constructive discharge claim. In so doing, the panel concluded that although Burns was able to show herself to be the target of offensive conduct by Horney, she had failed to present sufficient evidence of constructive discharge.

Burns now seeks the review of this Honorable Court on the issue of what evidence of constructive discharge is sufficient to withstand summary dismissal of a claim under the Age Discrimination in Employment Act.

REASONS FOR GRANTING THE WRIT

I. *The decision of the Court of Appeals in this case conflicts with prior decisions of other panels of the Court of Appeals for the Fourth Circuit because the Fourth Circuit is without an objective test for analyzing circumstantial evidence of constructive discharge at the summary judgment phase.*

The law on constructive discharge in the Fourth Circuit is clear. "An employee is protected from a calculated effort to pressure him into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by his co-workers." *Bristow v. Daily Press, Inc.*, 770 F. 2d 1251 (4th Cir. 1985). A plaintiff who alleges constructive discharge must prove two elements: deliberateness of the employer's action, and intolerability of the working conditions. *Id.*

The issue of deliberateness was the only issue addressed by the Fourth Circuit in the present case. Deliberateness can be demonstrated by actual evidence of intent by an employer to drive the employee from the job or circumstantial evidence of such intent, including *a series of actions that single out a plaintiff for differential treatment. Johnson v. Shalala,* 991 F. 2d 126, 131 (4th Cir. 1993), *cert. denied* 115 S. Ct. 52 (1994) (*emphasis added*). Deliberateness exists only if the

actions complained of "were intended by the employer as an effort to force the employee to quit." *Id., citing EEOC v. Federal Reserve Bank of Richmond,* 698 F. 2d 633, 672 (4th Cir. 1983), *rev'd on other grounds,* 467 U.S. 867 (1984).

Importantly, an employer's *intent* to force an employee to quit can be proved by "inference," including evidence "that the employer failed to 'act in the face of known intolerable conditions' and *did not treat all employees 'identically.'*" *Martin v. Cavalier Hotel Corp.*, 48 F. 3d 1343 (4th Cir. 1995) (*emphasis added*). Intent also may be shown by evidence that an employee's resignation was the "reasonably foreseeable consequence of the employer's conduct." *Amirmokri v. Baltimore Gas and Electric Co.*, 60 F. 3d 1126 (4th Cir. 1995), citing *Martin,* 48 F. 3d at 1356. Although the law in the Fourth Circuit on constructive discharge is clear in theory, it falls short because it fails to provide an objective and uniform test for analyzing circumstantial evidence of constructive discharge at the summary judgment phase.

The lack of an objective test for analyzing circumstantial evidence of constructive discharge led the panel which heard the present case to reach a decision which conflicts its prior constructive discharge decisions. As urged by Burns, the court agreed that

"AAF-McQuay has not presented evidence of equally offensive conduct by Horney toward other employees" *Burns*, 96 F. 3d at 14 (App. at 54).[2] Implicit in this statement is the recognition that (1) Horney's conduct was offensive, and (2) that Horney treated Burns differently than other employees. Under the standards announced by the Fourth Circuit in previous constructive discharge cases such as *Martin v. Cavalier Hotel Corp., supra*, and *Paroline v. Unysis Corp.*, 879 F. 2d 100 (4th Cir. 1989), vacated in part on rehearing *en banc*, 900 F. 2d 27 (1990) (*en banc)*(adopting panel dissenting opinion), one permissible inference to be drawn from the evidence is that Horney's disparate treatment of Burns was motivated by his desire to induce Burns to quit. Thus, it was an error to enter summary judgment upon this evidence.

However, despite the law and the evidence, the court nevertheless concluded that "even if Horney particularly disliked Burns, that alone does not support an inference that he intended to force her to resign." *Burns*, 96 F. 3d at 14 (App. at 54). This conclusion reached by the Fourth Circuit is wrong for two reasons. First, the only evidence before the court concerning Horney's perception of Mrs. Burns is Horney's own

[2]Page citations referenced by "App." will refer to the Appendix attached to the immediate Petition for Writ of Certiorari.

acknowledgement that he did *not* dislike her. The Fourth Circuit thus has no basis for its subjective assumption that Horney may have "particularly disliked Burns." Second, the Fourth Circuit has failed to give Burns the benefit of the inference that Horney intended to force her to quit by virtue of the fact that Horney treated Burns more offensively than other employees. Under the law of constructive discharge as implemented by the Fourth Circuit, Burns is entitled to this inference, especially since the court found that Burns had presented enough evidence from which a jury could determine that Horney had illegally demoted her. It is a logical conclusion that an employer who was motivated by illegal reasons in demoting an employee may have continued to be motivated by those same illegal reasons and acted upon them to force the employee out.

The source of the court's error in this action was its lack of objective framework for analyzing circumstantial evidence of constructive discharge at the summary judgment phase, allowing subjectivity to enter the decision making process and thus resulting in inconsistency of opinions on the subject. The lack of an objective framework invites the court to engage in the weighing of evidence and the drawing of inferences therefrom, which is clearly not permitted upon summary

judgment.[3] As the Fourth Circuit has recognized, "[i]t is the jury's job at trial to weigh the evidence, not the court's business to do so at summary judgment." *Tuck v. Henkel Corp.*, 973 F. 2d 371, *cert. denied* 113 S. Ct. 1276 (1993). The lack of an objective framework also allows the court to be inconsistent in its constructive discharge decisions, thus leaving employees and employers alike to struggle without clear guidance on this issue. Finally, the lack of an objective framework has in effect permitted constructive discharge in the Fourth Circuit to become all but a legal fiction, thus encouraging employers motivated by improper desires to use subversive measures to rid themselves of "protected class" employees rather than take overt acts such as discipline or discharge.

The present action ended prior to trial and prior to credibility determinations, the weighing of the evidence and the drawing of inferences, functions exclusively

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[3]As this Court recognized in *Texas Dep. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n. 8, 101 S. Ct. 1089, 1094, n. 8, 67 L. Ed. 2d. 207 (1981), the factual question of intentional discrimination can be "elusive," and thus this Court established what has become known as the "proof scheme" for circumstantial evidence of Title VII discriminatory treatment cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 729, 93 S. Ct. 1817, 36 L. Ed. 2d. 668 (1973). Because constructive discharge analysis is similar in nature to purposeful discrimination analysis under Title VII, Burns proposes that the Court take this opportunity and establish a similar objective test for the presentation of proof in constructive discharge cases.

belonging to a factfinder. When Burns presented evidence that Horney demoted her, harassed her, and then treated her more offensively than other employees, all as recognized by the Fourth Circuit, the Fourth Circuit was obliged to find that Burns had presented enough evidence to successfully avoid summary dismissal of her constructive discharge claim. The Fourth Circuit erred by allowing subjectivity to invade its analysis. This could have been prevented if the Fourth Circuit had an objective test for analyzing circumstantial evidence of constructive discharge, such as the test used by the Fifth Circuit Court of Appeals and discussed below. The need for an objective framework for analyzing circumstantial evidence of constructive discharge is necessary to protect the Age Discrimination in Employment Act and other anti-discrimination laws from extinction by virtue of educated but discriminatory employers and to eliminate the incentive to employers to engage in subversive activities against "protected class" employees. Thus, Burns asks this Court to grant her petition for certiorari.

II. ***The Fifth Circuit Court of Appeals has adopted an objective test for analyzing circumstantial evidence of constructive discharge at the summary judgment phase which could provide uniformity and fairness if***

implemented by all federal courts.

The Fifth Circuit provides a solution to the problems discussed above regarding the Fourth Circuit's subjective analysis of constructive discharge evidence. In 1994, the Fifth Circuit Court of Appeals decided an ADEA and constructive discharge action styled *Barrow v. New Orleans Steamship Association,* 10 F. 3d 292 (5th Cir. 1994). In that case, Judge Wisdom, writing for the court, established a set of objective factors to be used in analyzing circumstantial evidence of constructive discharge which was drawn from a survey of prior constructive discharge cases in that circuit. The factors that Judge Wisdom found relevant, either singularly or in combination, to the issue of constructive discharge in an employment discrimination action were: (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement that would make the employee worse off whether the offer was accepted or not. *Id.*, at p. 297.[4]

[4]Despite this test, because the employee in *Barrow* was unable to present evidence of *any* of the factors enunciated, the court found that he could not establish a case of constructive discharge.

According to the facts as determined by the Fourth Circuit, Burns has presented evidence that she was subjected to several of the factors listed above. If the Fourth Circuit had applied this test, it could not have dismissed her constructive discharge claim at the summary judgment phase. It would not have had to resort to its subjective assumptions about Horney's motivation in its analysis of the sufficiency of Burns' evidence. Instead the Fourth Circuit could have and would have passed the evidence of Burns' constructive discharge on to the appropriate fact finder, the jury, who after hearing the witnesses and evaluating their credibility would have been in a far better position to determine what actually motivated Horney's actions toward Burns.

The enactment of employment discrimination laws has not eliminated discrimination or prejudice. Employment discrimination laws give guidance to scrupulous employers as to permissible conduct toward employees. To unscrupulous employers, however, these same laws become fences to be crawled over, under or through. Hence, constructive discharge, which the Fourth Circuit fears is so "open to abuse" that it must be "carefully cabined," *Paroline*, 879 F. 2d at 109, becomes the means for some employers to rid themselves of protected class employees without the obvious risks of outright discharge. The evidence in a

constructive discharge case is often subtle and open to a wide range of interpretation depending upon the perspective of the individual triers of fact. At the summary judgment phase of litigation, there has been no trier of fact, no witnesses and no credibility determinations, and thus although constructive discharge claims may be open to abuse, there must be a way to separate valid constructive discharge charges from the unfounded claims without relying on the court's premature weighing of the evidence.

The *McDonnell Douglas* proof scheme sets up an objective test for analyzing circumstantial evidence of intent to discriminate in employment discrimination cases. The *Barrow* factors set up a similar objective test for analyzing circumstantial evidence of constructive discharge. To bring uniformity and fairness to the evaluation of circumstantial evidence of constructive discharge in ADEA actions or other employment discrimination actions at the summary judgment phase of litigation, the Fourth Circuit and other circuits should adopt objective factors test enumerated in *Barrow*. This case presents the Court with an opportunity to bring clarity and uniformity to constructive discharge law to all the circuits in employment discrimination actions.

CONCLUSION

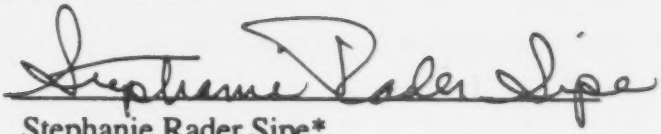
For the foregoing reasons, the petitioner

respectfully requests that this Court exercise its power of discretionary review and act to save the Age Discrimination in Employment Act from extinction by granting her petition for writ of certiorari.

FRANCES D. BURNS

By Counsel

LITTEN & SIPE:

By: 

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APPENDIX

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

FRANCES D. BURNS	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 94-00049H**
	)	
AAF-McQUAY, INC.,	)	
	)	
Defendant	)	
	)	

REPORT AND RECOMMENDATION

By: B. Waugh Crigler
U.S. Magistrate Judge

This action under the Age Discrimination in Employment Act (ADEA), 42 U.S.C. § 621, *et seq.*, is before this court under authority of 28 U.S.C. § 636(b)(1)(B) to render to the presiding District Judge a report and recommendation concerning the disposition of defendant's June 15, 1995 motion for summary judgment which is opposed by the plaintiff. On July 13, 1995, the court entertained argument, in consequence whereof this report issues.

BACKGROUND

Plaintiff, Frances Burns (Burns), was employed by defendant, AAF-McQuay, Inc. (McQuay), for some sixteen years as a secretary in McQuay's human resources

department. From 1978 to 1991, she was supervised by Chuck Walsh, and from 1991 to 1992, she was supervised by Gary Anderson. In 1992, Stephen B. Horney became the supervisor of the department, and he occupied that position during the period relevant to this suit. In February 1994 plaintiff was transferred to a switchboard position, and defendant replaced her with Donna Brown, a thirty-nine year old. On March 4, 1994, plaintiff resigned. She was sixty-five years old at the time.

Defendant believes the undisputed facts demonstrate that beginning in January 1993, Horney discovered "problems" with plaintiff's job performance as a secretary. Def's Brief Supp. Summ. at 2-4. Moreover, defendant argues that there were many deficiencies in plaintiff's job performance after she was transferred to the switchboard, and that her eventual separation from the company was not a constructive discharge, but a simple resignation.

Plaintiff, on the other hand, points to evidence of her "good" job performance prior to Horney's becoming her supervisor, and she relies on evidence of other specific events wherein Horney, or those working immediately under him, made reference to her age. Plaintiff contends this evidence demonstrates defendant's age animus that was directed against her when she was transferred to the switchboard. She controverts Horney's testimony in many particulars and offers the evidence of

another employee that Horney lodged personal attacks against her and generally treated plaintiff more harshly than others.

Plaintiff also alleges that Horney continued to harass her after her transfer to the switchboard.[1] Plaintiff's evidence is that the conditions became so intolerable that she was forced to resign.

APPLICABLE LAW

Plaintiff may survive summary judgment by presenting genuine issues of material fact either by direct evidence of age-based discrimination or by satisfying the requirements of the *McDonnell Douglas* test, as adopted for the disposition of ADEA cases. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); see also *Texas dep't of Community Affairs v. Burdine*, 450 U.S. 252-53 (1981); *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230 (4th Cir. 1982). Under either, plaintiff bears the ultimate burden of persuasion. To prevail, plaintiff must produce evidence which, if believed, would allow a reasonable trier of fact to conclude that she was discharged or otherwise discriminated against with respect to her employment because of her age. The evidence must show that, but for her employer's motive to discriminate against her because of her age, plaintiff would not have been subjected to adverse job action. *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4th Cir.

[1] Horney denies having harassed of the plaintiff both before and after her transfer to the switchboard.

1981).

Here, plaintiff claims that her supervisor's continued hostility toward her, coupled with the demoralizing effect of what she believed was a demotion, led to her eventual resignation and constituted a constructive discharge. *EEOC v. Clay Printing Co.*, 955 F.2d 936 (4th Cir. 1992). Plaintiff calls the court's attention to the following to support her contention that there is direct evidence of discrimination in this case sufficient to survive summary judgment: a) Horney's inquiries regarding her plans for retirement; b) his statement to her or one occasion to the effect that, though she was sixty-five, she was "walking around like a ten year old" c) statements made to Horney about plaintiff's being in the "protected group" d) comments by other managerial personnel concerning "getting rid of the old broad" "dead wood" and replacing plaintiff with "someone younger" and e) specific instances of other hostile treatment by Horney. Alternatively, plaintiff contends that her evidence establishes a *prima facie* case under the judicially-fashioned *McDonnell Douglas* proof scheme.

Defendant argues that none of the specific instances relied on by the plaintiff, singularly or in combination, are sufficient to establish a triable issue of fact because there is no nexus between the alleged discriminatory statements and the alleged adverse job action. Particularly, defendant contends that the Fourth Circuit in *Clay Printing* has

rejected the argument that isolated statements such as the ones offered in support of plaintiff's claim evince a corporate mind set to discriminate on the basis of age, 955 F.2d at 942. Moreover, defendant believes that plaintiff has failed to disclose evidence sufficient to show the nondiscriminatory reasons for the job action were pretextual.

While it is true that stray or isolated discriminatory remarks having no relationship to the job action cannot provide a basis for an ADEA claim, the circumstances under which the remarks are made very well may create genuine issues of fact as to their nexus with the job action. *O'Connor v. Consolidated Coin Caterers Corporation*, 56 F.3d 61, 1995 WL 341770 (4th Cir. 1995); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507 (4th Cir.), *cert. denied*, ____ U.S. ____, 115 S.Ct. 666 (1994).

CONCLUSIONS AND RECOMMENDATION FOR DISPOSITION OF THE MOTION

It is the view of this court that the circumstances under which the statements relied on by the plaintiff are relevant to determining whether defendant's nondiscriminatory reason was pretextual. More importantly, the context in which the statements were made are hotly in dispute, thus affecting the meaning to be attributed to them. The meaning is critical because it establishes the nexus to plaintiff's transfer. If plaintiff's interpretation is accepted by the trier of facts and there

certainly is a basis upon which a trier of fact could accept such, there would be substantial support for her theory that she was transferred and subjected to age-motivated harassment thereafter that was calculated to force her from the company.

Accordingly, this court

RECOMMENDS

that an order enter denying defendant's motion for summary judgment and recommitting the case to this court to establish a trial schedule.

The Clerk is directed to immediately transmit the record in this case to the Hon. James H. Michael, Jr., United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note objections, if any they may have, to this Report and Recommendation within (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection. The Clerk is directed to send a certified copy of this Report and Recommendation to all counsel of record.

ENTERED: /s/ B. Waugh Crigler

Judge

September 6, 1995

Date

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

FRANCES D. BURNS	)
	)
Plaintiff,	)
	)
v.	)No.94-00049H
	)
AAF-McQUAY, INC.,	)
	)
Defendant	)
	)

ORDER

JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED

as follows:

1. The defendant's Motion for Summary Judgment shall be, and it hereby is, granted.

2. The Civil Action, 94-00049-H, shall be, and it hereby is, dismissed with prejudice and stricken from the

docket of this court.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record.

ENTERED: /s/ James Michael, Jr.
United States District Judge

October 6, 1995
Date

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

FRANCES D. BURNS	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 94-00049H**
	)	
AAF-McQUAY, INC.	)	
	)	
Defendant	)	
	)	

MEMORANDUM OPINION

JUDGE JAMES H. MICHAEL, JR.

This matter comes before the court on the defendant's Motion for Summary Judgment. In this action, the plaintiff alleges that the defendant took unfavorable employment action against her in violation of the so-called Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. (1985) ("ADEA"). In its Motion for Summary Judgment, the defendant alleges that the plaintiff cannot establish that she was discriminated against based upon her age and that the plaintiff has failed to allege material facts to survive either the traditional

proof scheme or the judicially-created proof scheme pursuant to McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973), and its progeny. The United States Magistrate Judge[2] concluded that the plaintiff alleges facts which if accepted by the trier of fact would support the plaintiff's argument that the defendant's proffered legitimate business reasons for the adverse employment action were pretexual. Accordingly, the Magistrate Judge recommended that the court deny the defendant's Motion for Summary Judgment. The court has undertaken a de novo review of the record in this matter, pursuant to Orpiano v. Johnson, 687 F.2d 44 (4th Cir. 1982). The court declines to adopt the Magistrate Judge's recommendation and concludes that the defendant's Motion for Summary Judgment should be granted.

I.

The plaintiff, Frances D. Burns, was employed by the defendant, AAF-McQuay, Inc., for approximately sixteen years at the defendant's facility in Staunton, Virginia. The plaintiff was the secretary to the human resources manager until her reassignment to the position of switchboard operator. Approximately one month after her reassignment, the plaintiff resigned her employment with

[2]By Standing Order issued June 26, 1992, this court referred all civil actions to the United States Magistrate Judge for appropriate pre-trial matters and for conclusions of fact and recommendation for the disposition of dispositive matters, pursuant to 636(b)(1)(A) & (B). In the instant matter, the Magistrate Judge issued his Report and Recommendation on September 6, 1995.

the defendant. From 1978 to 1991, the plaintiff was supervised by Chuck Welsh (Welsh). From 1991 to 1992, the plaintiff was supervised by Gary Alderson (Alderson). In 1992, Stephen B. Horney (Horney) became the human resources manager and the plaintiff's supervisor. Horney was the plaintiff's supervisor at all times relevant to this matter.

The plaintiff claims that supervisors Welsh and Alderson consistently evaluated the plaintiff's performance as "commendable" or "excellent." The plaintiff claims that she maintained good working relationships with both Welsh and Alderson and that neither supervisor criticized her work performance. Alderson testified that the plaintiff was an excellent employee and that her job was definitely not in jeopardy because of her work performance.

The defendant claims, however, that Horney became dissatisfied with the plaintiff's performance. Horney recites numerous deficiencies in the plaintiff's performance: misfiled documents; typographical errors; errors preparing workers' compensation forms, union grievance forms, communications to plant personnel and general correspondence; failure to prepare job postings in a timely manner; failure to make hotel and meeting arrangements for a union grievance arbitration; and refusal to effect Horney's specific instructions to reproduce certain departmental forms, to prepare employee identification badges, and to maintain the supply closet.

Horney recites also an instance when the plaintiff referred to an employee's child as "a little nigger baby." Horney evaluated the plaintiff's performance at a level of "good" or "provisional." Horney testified that a "good" rating means that a person's job is "fairly secure" and that a "provisional" rating means that there is "a possibility of demotion." Horney claims that he conducted numerous formal and informal counseling sessions with the plaintiff regarding her performance.

The plaintiff alleges that Horney was motivated by age-based animus in making employment decisions regarding the plaintiff and that such animus is demonstrated best by comments made by several managerial employees of the defendant. First, Alderson recalls that Ira Luplow, the defendant's focus factory manager, told him that "he would like to get [the plaintiff] out of that position [secretary] and get someone else in there younger". Second, the plaintiff claims that Paul Farris or Carl Needham,[3] a former plant manager, stated that "we're going to have to get rid of the old broad downstairs." Third, the same employee heard "someone" at the corporate level make references to "dead wood."[4]

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[3]There is considerable confusion in the declarant's deposition testimony concerning which of the two employees -- Farris or Needham-- actually made this remark. The declarant testified that if Farris made the comment, then Farris did so *after* his separation from the defendant.

[4]During oral argument of the defendant's objections to the Magistrate Judge's Report and Recommendation, counsel for the plaintiff stated that she did not intend to rely upon the "dead wood" statement as proof of age-based animus by the defendant.

Lastly, the plaintiff claims that a non-supervisory employee questioned the plaintiff about the plaintiff's plans for retirement; stated that the plaintiff should retire and enjoy life, and stated that she would like the plaintiff's job.

Additionally, the plaintiff points to several comments made by Horney as indicating that "age" was foremost in the mind of Horney in taking the unfavorable employment actions against the plaintiff. First, the plaintiff claims that Horney asked her about her plans for retirement. Second, the plaintiff claims that Horney once stated that the plaintiff was sixty-five years old, but was walking around like a ten year old child. Finally, the plaintiff claims that Horney stated that the plaintiff "did not fit into his group."

In February 1994, Horney transferred the plaintiff to the position of switchboard operator and replaced the plaintiff with Donna Brown, then thirty-nine years of age. On March 4, 1994, the plaintiff resigned from the company. At the time of her transfer, the plaintiff was sixty-five years of age, and Horney was forty-six years of age. This action ensued.[5]

II. Analysis

A. Summary Judgment

Summary judgment is appropriate in cases where

The court, however, finds it necessary to address this statement as well as the others.

[5]The plaintiff initially filed a "Charge of Discrimination" with the United States Equal Employment Opportunity Commission. On October 31, 1994, the EEOC terminated its investigation because the plaintiff had filed suit in this court.

there is no genuine issue as to a material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). "Summary judgment is justified if, from the totality of the evidence presented, including pleadings, depositions, answers to interrogatories, and affidavits, the court is satisfied that there is no genuine factual issue for trial...." Sylvia Dev. Corp. v. Calvert County, Maryland, 48 F.3d 810, 817 (4th Cir. 1995). The court must draw any *permissible inferences* from the underlying facts in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). However, "the non-moving party must do more than present a 'scintilla' of evidence in its favor." Sylvia Dev., 48 F.3d at 818 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). [The non-moving party] must present sufficient evidence such that 'reasonable jurors could find by a preponderance of the evidence' for the non-movant...." Id. (quoting Anderson, 477 U.S. at 252). "If the evidence is 'merely colorable' or 'not significantly probative,' a motion for summary judgment may be granted." Id. (quoting Anderson, 477 U.S. at 249-50). Summary judgment is appropriate only where the record taken as a whole could not lead a rational trier of fact to find for the non-movant. Anderson 477 U.S. at 248-49.

B. Age Discrimination in Employment Act

The so-called ADEA provides, in relevant part, that "[i]t shall be unlawful for an employer...to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623 (1985). The Court of Appeals for the Fourth Circuit has identified the substantive elements of a claim pursuant to the ADEA as follows: "(1) that an employee covered by the [ADEA] (2) has suffered an unfavorable employment action by which an employer covered by the [ADEA] (3) under circumstances in which the employee's 'age was a determining factor' in the action in the sense that but for the employer's motive to discriminate against the employee because of employee's age, the employee would not have suffered the action'". Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 238 (4th Cir. 1982) (quoting Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1112 (4th Cir.), cert. denied, 454 U.S. 860 (1981); see also Tuck v. Henkel Corp., 973 F.2d 371, 374 (4th Cir. 1992); Fink v. Western Elec. Co., 708 F. 2d 909, 914 (4th Cir. 1983). "An employee can prove that age was a determining factor in an ADEA-prohibited employment action (1) under ordinary principles of proof using any direct or indirect evidence relevant to and sufficiently probative of the issue, or (2) under a judicially created proof scheme originally used in the Title VII context in McDonnel

Douglas Corp. v. Green..., and Texas Dep't of Community Affairs v. Burdine ..., and subsequently adapted for use in ADEA cases." Tuck, 973 F. 2d at 374-75 (citing Lovelace, 681 F.2d at 239).

1. An Employee Covered by the ADEA

In this instant action, there is no question that the plaintiff constitutes an employee covered by the ADEA. 29 U.S.C. § 631(a) (Supp. 1995) provides that "[t]he prohibitions in this chapter shall be limited to individuals who are at least 40 years of age." The plaintiff is clearly covered by the ADEA because she was sixty-five years of age when the allegedly unfavorable employment action occurred.

2. An Unfavorable Employment Action by an Employer

The plaintiff claims that two separate occurrences constitute "unfavorable employment action": (1) that the defendant's reassigning her to the position of switchboard operator constitutes a demotion; and (2) that the defendant's continued hostility toward the plaintiff coupled with the demoralizing effect of her reassignment forced her to resign her employment and thereby constitute a "constructive discharge." The defendant urges this court to find as a matter of law that the plaintiff was not "constructively discharged" and, thus, does not satisfy the second substantive element of an ADEA claim. The court will first address the "constructive discharge" claim.

The court agrees with the defendant that the plaintiff has not demonstrated evidence sufficient to lead a

reasonable trier of fact to conclude that the plaintiff was constructively discharged from the defendant's employment. A claimant presents a claim of "constructive discharge" by demonstrating "that the employer deliberately made working conditions intolerable and thereby forced the claimant to quit." E.E.O.C. v. Clay Printing Co., 955 F. 2d 936, 944 (4th Cir. 1992) (citations omitted). "Deliberateness exists only if the actions complained of 'were intended by the employer as an effort to force the employee to quit.'" Bristow v. Daily Press, Inc., 770 F. 2d 1251, 1255 (4th Cir. 1985), cert. denied, 475 U.S. 1082 (1986) (quoting E.E.O.C. v. Federal Reserve Bank of Richmond, 698 F. 2d 633, 672 (4th cir. 1983), rev'd on other grounds, 467 U.S. 867 (1986)). "Intolerability is 'assessed by the objective standard of whether a 'reasonable person' in the employee's position would have felt compelled to resign." Id.

The plaintiff suggests that Horney, in furtherance of his desire to have her leave the company, engaged in activity perceived by the plaintiff as "arrogant," "disrespectful," "unkind," and "hostile." The defendant rejoins with evidence of the plaintiff's concession that she "believed" or "assumed" that Horney's "arrogant attitude" toward her was motivated by a discriminatory, age-based animus. Thus, the plaintiff merely assumes that Horney's arrogance was specifically intended to force her to quit. Subjective assumptions are insufficient to demonstrate

deliberateness. See Felty v. Graves-Humphreys Co., 818 F. 2d 1126, 1128 (4th Cir. 1987) (unsupported speculation is not sufficient to survive summary judgment); Chappel v. GTE Prods. Corp., 803 F. 2d 261, 268 (6th Cir. 1986), cert. denied, 480 U.S. 919 (1987) ("Mere personal beliefs, conjecture and speculation are insufficient to support an inference of age discrimination."). Additionally, the defendant presents the testimony of two other employees, Jenanne Eppard and Kelly Balsley, who stated that Horney demonstrated an "arrogant attitude" toward them. "Where...all employees are treated identically, no particular employee can claim that difficult working conditions signify the employer's intent to force that individual to resign." Bristow, 770 F. 2d at 1255 (citations omitted).

Additionally, the plaintiff does not present evidence to satisfy the "intolerability" prong of "constructive discharge." The plaintiff states that Horney "harassed" her for reading the newspaper at the switchboard, even though she was doing so on her own time, that Horney criticized her for failing to open the switchboard by 7:00 a.m., when in fact she had opened the switchboard at 6:45 a.m.; and that Horney "berated" her for returning from lunch (the plaintiff does not indicate exactly "why" Horney berated her). "Every job has its frustrations, challenges and disappointments; these inhere in the nature of work. An employee is protected from a calculated effort to pressure him into resignation through the

imposition of unreasonably harsh conditions, in excess of those faced by his co-workers." Id. The court believes that the plaintiff has not demonstrated sufficiently that a reasonable person could permissibly conclude either that the plaintiff's mere assumptions satisfy the "deliberateness" requirement of "constructive discharge" or that the plaintiff's proferred examples of "intolerability" were unreasonably harsh to compel her resignation. Thus, the court concludes as a matter of law that the plaintiff was not "constructively discharged."

However, the defendant fails to address the plaintiff's claim that her reassignment to the position of switchboard operator constitutes an unfavorable employment action.[6] The court concludes that the plaintiff has demonstrated evidence sufficient to lead a reasonable trier of fact to conclude that the plaintiff's reassignment constitutes a demotion -- hence, an unfavorable employment action. Although the plaintiff retained her salary and benefits levels, a trier of fact could infer permissibly that the position of switchboard operator is a position of less prestige than the position of secretary to the director of human resources. The plaintiff has presented sufficient evidence that could lead the trier of

[6]The defendant apparently interprets the plaintiff's complaint as stating an allegation only that the defendant "constructively discharged" the plaintiff. Accordingly, the defendant does not argue the issue of the plaintiff's demotion. The court notes that the plaintiff's complaint states that "Horney demoted Burns because of her age." Plaintiff's Complaint, at ¶ 18.

fact to conclude that the plaintiff suffered an unfavorable employment action, and the plaintiff thus has presented a genuine issue of material fact concerning the second substantive element of an ADEA claim.

C. 'But For' Causation

Finally, the plaintiff is required to show that age was a determining factor in her demotion. In Spagnuolo, the court explained that "for an employee to recover under the [ADEA] it is not enough that he show merely that his age was a factor that affected the decision to discharge him. Rather, he must show that 'but for' his employer's motive to discriminate against him because of his age, he would not have been discharged." Spagnuolo, 641 F. 2d at 1112.

The plaintiff may satisfy the "but for" prong of establishing a cause of action under the ADEA by proving that "age was a determining factor in [her] termination in one of two ways." Goldberg v. B. Green & Co., 836 F. 2d 845, 847 (4th Cir. 1988). First, the plaintiff may meet her burden "under ordinary principles of proof by any direct or indirect evidence relevant to and sufficiently probative of the issue." E.E.O.C. v. Western Elec. Co., 713 F. 2d 1011, 1014 (4th Cir. 1983). Alternatively, the plaintiff may rely upon the judicially created proof scheme for Title VII cases which has been adapted for application in ADEA cases. Id.

1. Proof by Direct or Indirect Evidence

In an ADEA claim, the plaintiff can satisfy her burden

under ordinary principles of proof by producing direct evidence of a stated purpose to discriminate or circumstantial evidence of sufficient probative force to reflect a genuine issue of material fact.[7] Goldberg, 836 F. 2d at 848. The plaintiff has failed to satisfy her burden in the instant case.

The plaintiff fails to proffer any direct evidence of intent to discriminate based upon age. "Direct evidence of discrimination is evidence which, if believed, would prove the existence of a fact...without any inference or presumptions." Bodenheimer v. PPG Indus., Inc., 5 F. 3d 955, 958 (5th Cir. 1993). First, such evidence could consist of a notation on the plaintiff's personnel file or of evidence that her supervisor stated that she was reassigned because of her age. The plaintiff proffers no such evidence. See Clay Printing, 955 F. 2d at 941 (noting that the plaintiff could not point to any statement or piece of physical evidence indicative of age discrimination). The plaintiff alleges that it was *her opinion* that she was reassigned because of her age. However, a "naked opinion, without more, is not enough to establish a *prima facie* case of age discrimination." Goldberg, 836 F. 2d at 848. "Conclusory statements that

[7]During oral argument on the defendant's objections to the Magistrate Judge's Report and Recommendation, counsel for both parties "indicated" that they perceived the McDonnell Douglas proof scheme to be the most beneficial to the plaintiff's claim. However, neither party conceded that the ordinary proof scheme was inapplicable to the plaintiff's claim. Therefore, the court will analyze the matter under both proof schemes.

[the defendant's] state of mind and motivation are in dispute are not enough to withstand summary judgment." Id. (citing Zoby v. American Fidelity Co., 242 F. 2d 76, 80 (4th Cir. 1957)). See also Felty, 818 F. 2d at 1128 (unsupported speculation is not sufficient to survive summary judgment).

The plaintiff fails also to produce other evidence of sufficient probative value to withstand summary judgment. The plaintiff proffers that three occurrences indicate the defendant's discriminatory intent. First, the plaintiff claims that managerial employees of the defendant, other than Horney, made four statements which indicate a company-wide conspiracy to discriminate against the plaintiff on the basis of her age. One managerial employee questioned when the company was going "to get rid of that old broad in human resources."[8] An unidentified managerial employee reputedly stated that the company needed to get rid of "dead wood." Another managerial employee who did not supervise the plaintiff reportedly stated that "he would like to get Frances out of that position and get someone in there younger." Finally, a non-supervisory employee allegedly questioned the plaintiff concerning the plaintiff's plans for retirement and apparently noted to Horney that the plaintiff was "in the protected group." The defendant

[8]In his deposition testimony, the managerial employee reputedly clarified his statement and repeated the quote as "We need to get rid of the [human resources] people downstairs, Chuck [Welsh] and the old broad."

rejoins that the declarants were not the plaintiff's supervisors and held no authority over personnel decisions concerning the plaintiff.

In O'Connor v. Consolidated Coin Caterers Corp., 56 F. 3d 542 (4th Cir. 1995), the court noted that "the decisional law 'clearly reflects that isolated and ambiguous statements...'are too abstract, in addition to being irrelevant and prejudicial, to support a finding of age discrimination.'" Id. at 548-49 (quoting Gagne v. Northwestern Nat'l Ins. Co., 881 F. 2d 309, 314 (6th Cir. 1989) (quoting Chappell v. GTE Prods. Corp., 803 F. 2d 261, 268 n.2 (6th Cir.), cert. denied, 480 U.S. 919 (1987))). In O'Connor, the court held that a statement -- "it's about time we get some young blood in this company" -- was "innocuous and create[d] no inference of age bias." Id. at 549. See also Birkbeck v. Marvel Lighting Lighting Corp., 30 F. 3d, 507, 511-21 (4th Cir.), cert. denied, ___ U.S. ___, 115 S. Ct. 666 (1994) (holding that a statement -- "there comes a time when we have to make room for younger people" -- lacked discriminatory intent); Clay Printing, 955 F. 2d at 942 (holding that an employer's comments that the employer needed to "attract newer, younger people" and "needed young blood" failed to establish evidence of age discrimination); Gagne, 881 F. 2d at 314 (holding that an employer's comment that he "needed younger blood" did not raise a material fact with respect to establishing age discrimination). But see Tuck, 973 F. 2d at 377 n.5

("We do not read Clay Printing's holding to prevent statements that a company wants to replace its older employees with younger ones from being considered evidence of age discrimination, for it was to keep older workers from suffering adverse employment actions based on the assumption that younger workers are more desirable by virtue of their age that Congress enacted the ADEA".)[9] Additionally, the Fourth Circuit has specifically rejected the argument that a statement

[9]In her response to the defendant's objections to the Magistrate Judge's Report and Recommendation, the plaintiff first suggests that the analysis of Tuck is applicable to the instant action. The court has carefully reviewed Tuck and has found that case to be factually distinguishable from the instant action. In Tuck, the claimant contended that a former supervisor repeatedly stated to him that he "wanted to get rid of the older people and replace them with 'young blood.'" Tuck, 973 F. 2d at 373. Additionally, another employee testified that he saw the supervisor point to the claimant and state that the company needed "younger people." The claimant produced evidence that the supervisor rendered unjustly poor evaluations concerning the claimant and forwarded them to the Director of Human Services, who, the claimant argued, made the ultimate decision to terminate the claimaint's employment. Thus, in Tuck, the claimant was able to trace the causal trail of his termination back to the supervisor who was allegedly motivated by age-based animus. As discussed *infra*, the plaintiff in the instant action has not shown such a causal connection between the statements of Carl Needham or Paul Farris and the plaintiff's demotion. Additionally, in Tuck, the claimant presented the testimony of his immediate supervisor who stated that the claimant was working in a fully satisfactory manner. Id. at 372. There is no such evidence in the instant action. In Tuck, the claimant presented anecdotal evidence that the defendant company had a practice of firing older employees before they reached retirement age in order to save on pension benefits. There is no such claim in the instant action.

concerning "dead wood" evinces a corporate conspiracy to discriminate on the basis of age. In Clay Printing, the court noted that a statement about "dead wood" was made in the context of employee evaluations and reflected the company's position on employee seniority, not employee age. Id. at 942.

In addition, the plaintiff overwhelmingly fails to demonstrate a connection, or nexus, between the alleged statements and the alleged discriminatory action. In Clay Printing, the court declined to hold that evidence was substantially probative where no nexus existed between alleged discriminatory statements and any of the employment decisions made by the defendant company. Clay Printing, 955 F. 2d at 942. See also O'Connor, 56 F. 3d at 549 (noting that there was no nexus between a statement made to another employee two days before the alleged action and the termination of the claimant); Cone v. Longmount United Hosp. Ass'n., 14 F. 3d 526, 531 (10th Cir. 1994 (ruling that "isolated comments, unrelated to the challenged action, are insufficient to show discriminatory animus in termination decisions"); Figures v. Board of Pub Utils., 967 F. 2d 357, 360-61 (10th Cir. 1992) (noting that racial comments are not probative of discrimination unless they are linked to the challenged action); Merrick v. Farmers Ins. Group, 892 F. 2d 1434, 1438-39 (9th Cir. 1990) (holding that certain statements unconnected to the employment decision-making process are simply stray remarks that do not demonstrate

discriminatory intent). But see Tuck, 973 F. 2d at 377 (where there was a causal trail between oral and written comments made by a former supervisor, who the claimant argued was motivated by age-based animus, and the decision-makers in the claimant's termination.) In the instant matter, the court cannot locate a nexus between the alleged discriminatory statements and the employment actions taken by Horney.

First, concerning the "old broad" statement, there is no evidence that either Paul Farris or Carl Needham was a supervisor of either Horney or the plaintiff. There is no evidence that either Farris or Needham repeated the remark to Horney or otherwise spoke to Horney concerning the plaintiff, her age, or her work performance.[10] Additionally, the declarant is unsure

[10]Counsel for the plaintiff urges this court that a jury could find that Carl Needham or Paul Farris or Ira Luplow could have talked to Horney about the plaintiff because they must have talked to him about other matters. The court is not possessed of the analytical dexterity to make an inferential leap of such magnitude. The plaintiff's counsel's suggestion stands in direct contradiction to the evidence presented in deposition testimony, in which Horney states that these individuals did not speak to Horney regarding the plaintiff. The plaintiff may not survive summary judgment by heaping inference upon inference. See, e.g., O'Connor, 56 F. 3d at 545 (noting that a non-movant cannot survive summary judgment through "the building of one inference upon another."); Beale v. Hardy, 769 F. 2d 213, 214 (4th Cir. 1985) (same). While the court must construe all permissible inferences in favor of the non-moving party, the court is not required to adopt an inference that is "strained, forced, or contrary to reason." Bloodworth v. Ellis, 267 S.E. 2d 96, 99 (Va. 1980). "'Permissible inferences must still be in the range of reasonable probability...and it is the duty of the court to

about who actually made the statement.[11]

Similarly, the declarant is unsure who made the "dead wood" statement. The declarant could not recite who made the statement, when the statement was made, whether the statement related to any employment decision, or whether the statement related to the plaintiff. As in O'Connor, there is no evidence of the context in which this statement was made, and the court is compelled to reach the same conclusion as did the court in O'Connor: "[w]ithout this requisite nexus, this statement evinces no discriminatory intent." O'Connor, 56 F. 3d at 549.

The third statement - "get [the plaintiff] out of that position and get someone else in there younger" - falls victim to similar analysis. The plaintiff proffers the testimony of Alderson who stated that Ira Luplow, a

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withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture.'" Sylvia Dev., 48 F. 3d at 818 (quoting Ford Motor Co. v McDavid, 259 F. 2d 261, 266 (4th Cir.), cert. denied, 358 U.S. 908 (1958)). In the instant matter, the court concludes that the plaintiff's proffered inference is strained, forced, and contrary to both reason and the evidence presented in the pleadings of this action.

[11]The declarant suggested that if he were permitted to "guess," that he would say that it was someone in a supervisory position who made the statement. This testimony causes the court considerable concern about the admissibility into evidence of these alleged statements if the action were to proceed to trial. "[H]earsay, like other evidence inadmissible at trial, is ordinarily an inadequate basis for summary judgment." HUD v. Cost Control Mktg & Sales Management, __ F. 3d ___, No. 94-2357, slip op. at 8 (4th Cir. September 8, 1995) (citing Maryland Contractors Ass'n v. State of Maryland, 93[illegible] 1246, 1251-52 (4th Cir.), cert. denied, 502 U.S. 939 (19[illegible]

former managerial employer, made the statement to Alderson in January 1992. There is no evidence that Luplow was responsible for the unfavorable employment action taken against the plaintiff: Luplow left the Staunton facility five months before the demotion. There is no evidence that Luplow repeated the statement to Horney or that Alderson conveyed the statement to Horney. By contrast, in Tuck, there was evidence that the employee making the statement indicative of age-based animus actually repeated the statement to the Director of Human Resources, who made the decision to terminate the claimant. Additionally, the alleged statement is too remote in time from the alleged employment action to provide evidence of age discrimination. In Birkbeck, the court held that a statement made two years before a discharge was too remote in time to serve as evidence. Birkbeck, 30 F. 3d at 512. See also Phelps v. Yale Sec., Inc. 986 F. 2d 1020, 1026 (6th Cir.) (finding that a statement made approximately one year before a layoff was too remote to have influenced the termination decision), cert. denied, ___U.S. ___, 114 S. Ct. 175 (1993); Guthrie v. Tifco, 941 F. 2d 374, 379 (5th Cir. 1991). In the instant action, the defendant argues that the "younger person" statement was made twenty-five months before the plaintiff was transferred to the switchboard. The plaintiff fails to present sufficient evidence using the "younger person" statement both because there is no nexus between the declarant and the plaintiff or the unfavorable

employment action and because the temporal connection is far too attenuated to permit an inference of causal connection.

The plaintiff's proffer of the statements made by Jenanne Eppard concerning the plaintiff's inclusion in "the protected group" and the plaintiff's plans for retirement are, unfortunately, the least probative. The first statement reflects merely a truism. In Birkbeck, the court held that a statement - "there comes a time when we have to make way for younger people" - "reflects no more than a fact of life and as such is merely a 'truism[ ] that carries with it no disparaging undertones.'" Birkbeck, 30 F. 3d at 512 (quoting Smith v. Flax, 618 F. 2d 1062, 1066 (4th Cir. 1980)).[12] Similarly, the questions concerning the plaintiff's plans for retirement do not evince discriminatory intent on the part of the defendant. Significant to this analysis is the fact that the declarant - Jenanne Eppard - was the Manager of Administrative Services, was not a supervisor of the plaintiff, and was herself supervised by Horney. These statements cannot credibly indicate the defendant's age-based animus.

The court now turns its attention to statements allegedly made by Horney that the plaintiff claims evince the defendant's discriminatory intent. First, the plaintiff

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[12]Additionally, Jenanne Eppard was forty-three years of age and also in the protected group. It is inconceivable that Eppard was suggesting to Horney that he take unfavorable employment action against employees merely by virtue of their membership in the protected group.

claims that Horney once stated to her that she was sixty-five years old and should not be walking around like a ten-year old child. The plaintiff asks the court to draw the inference that this statement evinces age-based animus on the part of Horney. The court cannot draw such an inference. The first clause of the statement merely states a truism -- the plaintiff was sixty-five years old. The clause, taken as a whole, does not indicate that Horney was making a negative statement about older individuals; rather, the statement indicates Horney's preference for older individuals. The permissible inference to be drawn from this statement is that Horney was indicating a preference for mature behavior on the part of his employees. Again, the inference that the plaintiff urges this court to draw is strained and forced. This evidence does not suffice as probative evidence on the basis of which a fair-minded jury could return a verdict for the plaintiff. See Clay Printing, 955 F. 2d at 942-43.

Second, the plaintiff claims that Horney stated to her that he did not consider her to be a member of "his group." The plaintiff interprets this statement as indicating that "his group" consisted of members without the age group of the plaintiff. This is mere conjecture on the part of the plaintiff. In Birkbeck, the court noted that an employer's agent who allegedly made discriminatory remarks was also in the protected class. The court observed that "statements about age may well not carry the same animus as those about race or gender. Unlike

race or gender differences, age does not create a true we/they situation -- barring unfortunate events, everyone will enter the protected age group in their lives." Birkbeck, 30 F. 3d at 512. Indeed, Horney could not have been referring to the statutory "protected group" pursuant to the ADEA because Horney *is* a member of that group. As in Birkbeck, where the employer's agent was fifty-two years of age and was therefore in the protected class, Horney in the instant action was forty-six years of age and therefore in the protected class. Additionally, if this court were to permit such statements to suffice as probative evidence of age discrimination, then an identical statement could suffice as probative evidence of racial discrimination, sexual discrimination, or religious discrimination. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson, 477 U.S. at 252. "In short, a finding of age discrimination would 'only be an outright conjecture and not by any rational assessment of probabilities.'" Clay Printing, 955 F. 2d at 943 (quoting Lovelace, 681 F. 2d at 243-44).

2. Proof Under the Judicially Created Proof Scheme

A claimant may rely upon the judicially-fashioned alternative proof scheme established by the United States Supreme Court in McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973) and Texas Dep't of Community

Affairs v. Burdine, 450 U.S. 248 (1981), and adapted to ADEA cases. See Lovelace, 681 F. 2d at 239; Flax, 618 F. 2d at 1066 n.3. The alternative proof scheme consists of three steps. First, the plaintiff must establish a *prima facie* case by satisfying four (4) elements: The plaintiff must demonstrate: (i) that she is a member of the protected age group; (ii) that she was discharged or demoted; (iii) that at the time of discharge or demotion, she was performing her job at a level that met her employer's legitimate expectations; and (iv) following her discharge or demotion, she was replaced by someone of comparable qualifications outside the protected class. See McLawhorn v. John W. Daniel & Co., 924 F. 2d, 535, 536 (4th Cir. 1991). Second, if the plaintiff establishes a *prima facie* case, the "burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" Burdine, 450 U.S. at 252-53 (quoting McDonnell Douglas, 411 U.S. at 802-04). Third, if the defendant is successful in demonstrating a legitimate, nondiscriminatory reason, then the burden shifts back to the plaintiff to "demonstrate by a preponderance of the evidence that defendant's reasons were a pretext for discrimination." Clay Printing, 955 F. 2d at 941 (citing Burdine, 450 U.S. at 252-53). The court will address each of these steps *seriatim*.

(a) Establishing a Prima Facie *Case*

As discussed *ante* Part II-B-1, the plaintiff constitutes an employee covered by the ADEA. As discussed further

ante Part II-B-2, the plaintiff has presented sufficient evidence by which a reasonable trier of fact could conclude that the plaintiff suffered an unfavorable employment action by reason of her reassignment from the position of secretary to the human resources manager to the position of switchboard operator. Therefore, the plaintiff has presented evidence to satisfy the first two elements of the *prima facie* case pursuant to the McDonnell Douglas proof scheme.

As for the third element of the *prima facie* case, the plaintiff claims that she was performing her job at a satisfactory level that met her employer's legitimate expectations. The plaintiff offers evidence of performance evaluations which evaluated the plaintiff's performance at a "commendable" or "excellent" level. In the period immediately preceding the plaintiff's demotion, Horney rates her performance as "good" or "provisional." Horney defines "good" as meaning that a person's job is "fairly secure" and "provisional" as meaning that there is "a possibility of demotion." In Conkwright v. Westinghouse Elec. Corp., 933 F. 2d 231 (4th Cir. 1991), the court held that summary judgment was inappropriate where the claimant presented evidence of performance evaluations that stated "produces acceptable results -- requires improvement." Id. at 234.[13] Clearly,

[13]In Conkwright, the court noted that there was a disparity between the proper interpretation given to "produces acceptable results" and the proper interpretation given to "requires improvement." The court stated that it was plausible that the statement "produces acceptable results" could imply that an

evaluations noting "excellent" or "commendable" performance indicate performance at a level meeting the defendant's legitimate expectations.

However, the defendant urges the court to consider the probative value of this evidence as diminished because the performance evaluations reflect a time period removed from the time period in which the plaintiff's performance allegedly declined. In McLawhorn, the district court concluded that the defendant's job appraisals were not relevant evidence because they concerned time periods before the plaintiff's work performance began to deteriorate. McLawhorn, 924 F. 2d at 536. Accord Hong v. Children's Memorial Hosp., 993 F. 2d 1257, 1262 (7th Cir. 1993) (concluding that the plaintiff could not satisfy the burden of showing that her job performance was adequate by showing that her performance was adequate for some period of time during her employment. The critical issue was whether her performance was adequate at the time of her termination.), cert. denied, ___ U.S. ___, 114 S. Ct. 1372 (1994). In the instant case, the plaintiff's favorable performance evaluations were conducted within a time period from 1982 to 1989.

The court concludes, however, that it would be improper to grant summary judgment merely based upon this element of *prima facie* case under the facts as

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employee meets an employer's expectations. Similarly, a performance evaluation of "commendable" or "excellent" could imply that the plaintiff was meeting the defendant's expectations.

presented by this case. The plaintiff has produced evidence that she performed her job at a level that met the defendant's expectations, notwithstanding the lapse in time between the favorable evaluations and Horney's evaluations. The court can conceive of many permissible inferences to be drawn from these facts. The plaintiff could argue that Horney was motivated by age-based animus in evaluating the plaintiff's performance and that therefore the less-than-favorable evaluations should not be weighed heavily as evidence of the plaintiff's nonperformance of her job requirements. The plaintiff could argue that Horney's expectations were not legitimate and that therefore his negative evaluation of her performance was based upon extraordinary expectations. Thus, the court concludes that the plaintiff has demonstrated sufficient evidence to indicate a genuine issue of material fact regarding element three of the *prima facie* case.

Lastly, the plaintiff has shown that she was replaced by someone outside of the protected class. The plaintiff was replaced by Donna Brown, then a thirty-nine year old woman.

(b) The Defendant's Legitimate, Nondiscriminatory Reasons

Assuming *arguendo* that the plaintiff has established a *prima facie* case under the alternative proof scheme, the defendant offers a plethora of legitimate, nondiscriminatory reasons for the demotion. "The

employer is not required to prove absence of a discriminatory motive, but merely articulate some legitimate reason for its action." Western Elec. Co., 713 F. 2d at 1014 (citing Smith v. University of North Carolina, 632 F. 2d 316, 332-33 (4th Cir. 1980)). The defendant must carry a burden of production, not a burden of persuasion. Clay Printing, 955 F. 2d at 941. The court must determine only that, as a matter of law, the evidence is legally admissible, that it is not intrinsically unworthy of acceptance, and that the reason as advanced is a legitimate one. Lovelace, 681 F. 2d at 230.

The defendant offers the following as proof of a legitimate, nondiscriminatory reason for the demotion: the plaintiff misfiled materials; committed typographical errors; committed errors preparing workers' compensation forms; failed to prepare job postings in a timely manner; failed to make hotel and meeting arrangements for a union grievance arbitration; and refused Horney's specific instructions to reproduce certain departmental forms, to prepare employee identification badges, and to maintain the supply closet. The defendant also recites an instance when the plaintiff referred to an employee's child as "a little nigger baby." The court concludes that the defendant has satisfied its burden of production under this element of the McDonnell Douglas proof scheme.[14]

[14]The court notes that the defendant argues also that there were legitimate, nondiscriminatory reasons for the demotion that

(c) The Plaintiff's Burden to Demonstrate that the Defendant's Proffered Legitimate, Nondiscriminatory Reasons are Pretextual

A plaintiff may satisfy the pretext prong of McDonnell Douglas by proof "either directly by persuading the court that a discriminatory reason more likely motivated the employer or by indirectly showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256. The burden of persuasion remains with the plaintiff. Clay Printing, 955 F. 2d at 941. The plaintiff's burden has become whether, as among the proffered reasons, the circumstantial evidence supports as a reasonable probability the inference that "but for" the plaintiff's age she would have been demoted. Lovelace, 681 F. 2d at 244.

The plaintiff has not met her burden of persuasion that a discriminatory reason more likely motivated the employer. As discussed *ante* Part II-C-1, the plaintiff simply has not presented enough evidence to create a triable issue. The plaintiff's "still wholly circumstantial evidence, no more suffice[s] to support the necessary

---

the defendant *discovered after the demotion*. The court declines to consider such evidence, especially on a motion for summary judgment. In McKennon v. Nashville Banner Publishing Co., ___ U.S. ___, 115 S. Ct. 879 (1995), the Court stated that "[t]he employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason." Id. at 885. See also Price Waterhouse v. Hopkins, 490 U.S. 228, 252, 260-61 (1989) (the employer's legitimate reason for discharge in a mixed-motive case will not suffice if that reason did not motivate at the time of decision.)

inference as against the defendant's specifically advanced explanation than it suffice[s] to support it in the absence of any proffered alternative." Id. at 245. Thus, the plaintiff has failed to proffer evidence to permit a reasonable jury to conclude that the defendant's legitimate business reasons were merely pretextual.

The plaintiff's Brief in Opposition recites several rejoinders to the defendant's proffer of legitimate, nondiscriminatory reasons for the demotion. While Horney states that the files were not "aesthetically appealing," he states that they "did the job." Horney admits that keeping the supply closet clean was not a high priority. Horney did not have specific information regarding his accusation that the plaintiff was a "gossip." The plaintiff asserts that many of the reasons given by the defendant for the plaintiff's demotion were discovered after the demotion. Taking all inferences in favor of the plaintiff, it appears that when the dust has settled the defendant is left with two *unrefuted* legitimate, nondiscriminatory reasons for the plaintiff's demotion: six to ten typographical errors made by the plaintiff during the course of one year, and the plaintiff's failure to schedule the arbitration meeting. Of course, the question is whether these reasons are enough. In Goldberg, the claimant argued that his employer's reasons for firing him were "incredibly outrageous" and that therefore a genuine issue of material fact existed as to whether the employer intended to discriminate against him. Goldberg, 836 F.

2d at 849.[15] The Fourth Circuit held that "[w]hile that type of evidence may tend to demonstrate that [the employer's] termination of [the employee] was arbitrary, it does not reflect any intent to discriminate on the basis of age." Id. See also Clay Printing, 955 F. 2d at 946 ("It is not for this court or any other governmental agency to direct the business practices of any company. In the context of this case, [the employer] was free to make its business decisions, including reorganizing its work force, so long as it did not violate the ADEA."). The court concludes that the plaintiff has failed to refute all of the legitimate, nondiscriminatory reasons proffered by the defendant for the plaintiff's demotion.

III. Conclusion

Recently, the United States Court of Appeals for the Fourth Circuit aptly stated that:

> Despite the "minutiae of the various proof schemes set forth in McDonnell Douglas," we emphasized in Birkbeck v. Marvel Lighting Company, 30 F. 3d 507, 511 (4th Cir. 1994), that the "straightforward" question to be answered in discrimination cases is whether the plaintiff has

[15] In Goldberg, the employer hired a building contractor to conduct repairs and modifications at its main plant. The employer discovered that the building contractor had additionally built a doghouse for the claimant's pet. The claimant argues that he paid the building contractor for the doghouse out of his personal funds. Nonetheless, the court rejected the claimant's argument that the employer's reason was incredible and upheld the district court's grant of summary judgment.

successfully demonstrated that she was the victim of age discrimination on the part of the employer. To withstand summary judgment, [a claimant] must produce direct or circumstantial evidence "of a stated purpose to discriminate [on the basis of age] of sufficient probative force to reflect a genuine issue of material fact." Clay Printing, 955 F. 2d at 941 (quoting Goldberg v. B. Green & Co., Inc., 836 F. 2d 845, 848 (4th Cir. 1988). Hensen v. Liggett Group, Inc., ___ F. 3d ___, No. 94-2440, slip op. at 6 (4th Cir. August 9, 1995). In the instant action, the plaintiff has not presented evidence "of sufficient probative force" to permit this court to answer the "straightforward" question in the affirmative. Consequently, the defendant's Motion for Summary Judgment must be granted. An appropriate Order shall this day enter.

ENTERED: /s/ Hon. James H. Michael, Jr.
United States District Judge

October 6, 1995
Date

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FRANCES D. BURNS	)
	)
Plaintiff-Appellant,	)
	)
v	)No.95-2831
	)
AAF-McQuay, Incorporated, a Minnesota Corporation.	)
	)
Defendant-Appellee.	)
	)
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)
	)
Amicus Curiae.	)

Appeal from the United States District Court for the Western District of Virginia, at Harrisonburg. James H. Michael, Jr., Senior District Judge.
(CA-94-49-H)

Argued: June 3, 1996

Decided: September 23, 1996

Before ERVIN and MOTZ, Circuit Judges, and SPENCER, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part and reversed and remanded in part by published opinion. Judge Ervin wrote the opinion, in which Judge Motz and Judge Spencer joined.

COUNSEL

ARGUED: Stephanie Rader Sipe, LITTEN & SIPE, Harrisonburg, Virginia, for Appellant. Paul D. Ramshaw, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae. Bruce McCoy Steen, MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Charlottesville, Virginia, for Appellee. **ON BRIEF:** Donald D. Litten, Sr., LITTEN & SIPE, Harrisonburg, Virginia, for Appellant. C. Gregory Stewart, General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae. J. Robert Brame, III, MCQUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Charlottesville, Virginia, for Appellee.

OPINION

ERVIN, Circuit Judge:

Frances Burns sued her former employer, AAF-McQuay, Inc., alleging that she was demoted and constructively discharged in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S. C. § 621 *et seq.* The magistrate judge found a genuine issue of material fact as to whether AAF-McQuay's asserted reasons for the demotion were pretextual. The district court disagreed, finding insufficient evidence of pretext or of constructive discharge, and entered summary judgment in favor of AAF-McQuay. We affirm the court's finding that Burns failed to prove constructive discharge, but reverse and remand for trial on the question of whether she was demoted illegally.

I

Federal question jurisdiction over ADEA actions is appropriate under 28 U.S.C. § 1331. This court has appellate jurisdiction over the district court's summary judgment under 28 U.S.C. § 1291. We review the district court's summary judgment *de novo, e.g., Higgins v. E.I. DuPont de Nemours & Co.*, 863 F. 2d, 1162, 1167 (4th Cir. 1988), viewing the evidence in the light most favorable to the non-moving party. *E.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

II

The district court stated the facts in the light most favorable to Burns:

The plaintiff, Frances D. Burns, was employed by the defendant, AAF-McQuay, Inc., for approximately sixteen years at the defendant's facility in Staunton, Virginia. The plaintiff was the secretary to the human resources manager until her reassignment to the position of switchboard operator. Approximately one month after her reassignment, the plaintiff resigned her employment with the defendant. From 1978 to 1991, the plaintiff was supervised by Chuck Welsh (Welsh). From 1991 to 1992, the plaintiff was supervised by Gary Alderson (Alderson). In 1992, Stephen B. Horney (Horney) became the human resources manager and the plaintiff's supervisor. Horney was the plaintiff's supervisor at all times relevant to this matter.

The plaintiff claims that supervisors Welsh and Alderson consistently evaluated the plaintiff's performance as "commendable" or "excellent." The plaintiff claims that she maintained good working relationships with both Welsh and Alderson and that neither supervisor criticized her work performance. Alderson testified that the plaintiff was an excellent employee and that her job was definitely not in jeopardy because of her work performance.

The defendant claims, however, that Horney became dissatisfied with the plaintiff's performance.

* * *

> In February 1994, Horney transferred the plaintiff to the position of switchboard operator and replaced the plaintiff with Donna Brown, then thirty-nine years of age. On March 4, 1994, the plaintiff resigned from the company. At the time of her transfer, the plaintiff was sixty-five years of age, and Horney was forty-six years of age.

Memorandum Opinion at 2-4,

III

A

The Fourth Circuit recognizes two avenues of proof by which an employee can prove an ADEA violation: "(1) under ordinary principles of proof using any direct or indirect evidence relevant to and sufficiently probative of the issue, or (2) under a judicially created proof scheme originally used in the Title VII contact in *McDonnell Douglas Corp v. Green* ...and subsequently adapted for use in ADEA cases." *Tuck v. Henkel Corp.*, 973 F. 2d 371, 374-75 (4th Cir. 1992) (citing, *inter alia, McDonnell Douglas*, 411 U.S. 792 (1973)), *cert. denied*, 507 U.S. 918 (1993). The district court determined that Burns had failed to create a genuine issue of material fact under either framework.

On appeal, Burns relies only on the *McDonnell Douglas* scheme. We described its operation in *Tuck*:

> [T]he employee must first establish a *prima facie* case of age discrimination by showing (1) he is a

member of the protected age group (over 40); (2) he was discharged or demoted; (3) at the time of discharge or demotion he was performing his job at a level that met his employer's legitimate expectations; and (4) following his discharge or demotion, the plaintiff was replaced by someone of comparable qualifications outside the protected class.[16] Such a *prima facie* case creates only an inference of age discrimination, which the employer can then rebut by presenting legitimate, non-discriminatory reasons for the termination. If the employer rebuts the employee's inference of age-based discrimination, the employee can still prevail by demonstrating by a preponderance of the evidence that the defendant's proffered reason was a pretext *for discrimination*. To make this demonstration, the employee must

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[16]In April the Supreme Court reversed a decision of the Fourth Circuit in *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996). The Court took no position on the applicability to the ADEA of the *McDonnell Douglas* framework:

> In assessing claims of age discrimination brought under the ADEA, the Fourth Circuit, like others, has applied some variant of the basic evidentiary framework set forth in *McDonnell Douglas*. We have never had occasion to decide whether that application of the Title VII rule to the ADEA context is correct, but since the parties do not contest that point, we shall assume it.

116 S. Ct. at 1309-10 (citations and footnote omitted). The Court did modify the framework somewhat, however, by ruling that the worker who replaces an ADEA plaintiff need not be outside the protected class: "The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age." *Id.* at 1310.

> show that as between the plaintiff's age and the defendant's explanation, age was the more likely reason for the dismissal, or that the employer's proffered explanation is simply "unworthy of credence." The burden of persuasion remains with the plaintiff throughout. 973 F. 2d at 375 (emphasis added) (citations omitted).

The district court found that Burns had satisfied the requirements of the *prima facie* case, so the burden of production shifted to AAF-McQuay to demonstrate nondiscriminatory reasons for demoting her. Moreover, the court agreed that Burns had responded to AAF-McQuay's asserted reasons with sufficient evidence that a jury could disbelieve some of them. It concluded, however, that she had not created a jury issue because her evidence failed to challenge two of the reasons.

Burns contends on appeal that her evidence, while perhaps failing to rebut each of AAF-McQuay's reasons individually, is sufficient in the aggregate that a jury reasonably could find all of AAF-McQuay's proffered reasons to be pretextual. She is joined in that position by the EEOC, as amicus curiae. The *McDonnell Douglas* framework, the EEOC argues, does not require a plaintiff to refute *every* nondiscriminatory reason offered by the employer. A particular reason may be "*so* arbitrary or unreasonable that a factfinder may infer, on that ground alone, that the challenged decision was not actually based on that reason, and that the reason is a pretext for

discrimination." Or, it continues, the plaintiff's evidence undermining some of the defendant's asserted reasons might lead a jury to believe that the remaining reasons also are pretextual.

Burns' and EEOC's proposed application appears compelling in a vacuum, because an employer should not be able to avoid trial by offering flimsy excuses. But the *McDonnell Douglas* framework is not a vacuum. It is a cousin of *res ipsa loquitur* that effectively shifts the burden of production by allowing a plaintiff to get to the jury on her own flimsy evidence, without proving a discriminatory motive, if the employer cannot show a nondiscriminatory motive. It does not shift the burden of proof, however, but offers an alternate means by which a plaintiff may prove the same ultimate point:

> Despite the "minutiae of the various proof schemes set forth in *McDonnell Douglas*, " we emphasized in *Birkbeck v. Marvel Lighting Company*, 30 F. 3d 507, 511 (4th Cir.[]), [*cert. denied*, 115 S. Ct. 666 (1994),] that the "straightforward" question to be answered in discrimination cases is whether the plaintiff has successfully demonstrated that she was the victim of age discrimination on the part of the employer. To withstand summary judgment, [a claimant] must produce direct or circumstantial evidence "of a stated purpose to discriminate [on the basis of age] of sufficient probative force to reflect a genuine issue of material fact." *[EEOC v.] Clay*

Printing, 955 F. 2d [936,] 941 [(4th Cir. 1992)] (quoting *Goldberg v. B. Green & Co., Inc.*, 836 F. 2d 845, 848 (4th Cir. 1988)).

Henson v. Liggett Group, Inc., 61 F. 3d 270, 275 (4th Cir. 1995). Therefore, if the plaintiff offers nothing to disprove the defendant's nondiscriminatory explanations, the explanations' weakness alone is insufficient to create an issue of pretext. Instead, the burden of production returns to the plaintiff to present affirmative evidence of age-based animus.

The district court found that Burns' evidence was insufficient to reach the jury under the traditional proof scheme. Even if we accept that conclusion, however, it is not dispositive of the pretext question under the *McDonnell Douglas* framework. A showing of pretext demands the same type of proof -- affirmative evidence of discriminatory intent -- required under traditional principles, but not necessarily the same quantum. Affirmative proof that alone does not suffice under the traditional scheme may, when combined with the weakness of the defendant's asserted nondiscriminatory reasons, create a prima facie case of pretext.

Burns reports several incidents that, she contends, reveal Horney's age-based animus toward her. She alleges that Horney "told her that she did not 'fit into [his] group,'" "accused her of walking around like a 'ten-year-old' even though she was sixty-five," "questioned her about her plans to retire," and "threaten [ed] to demote

her." Burns also points to concerns Horney expressed about the quality of her work, including typographical errors. Horney was asked in his deposition what he thought might have caused Burns's unsatisfactory performance:

> A. My guess is that would probably link with the loss of skills. Again, that's just a general statement.
>
> Q. Loss of skills. What would be a cause of loss of skills?
>
> A. I don't know. It's by virtue of not doing it enough or doing too much or whatever. I don't know as far as why do people lose skills. Why do you lose your memory? Why do you have problems reading? Is it your eyeglasses? I don't know. Inability to concentrate, I guess, would probably incorporate all of those in potential loss of skill.
>
> Q. Do you think her age had anything to do with her loss of skills?
>
> A. I don't know. That's not my -- I don't know. I've seen people that had skills that were younger and for some reason lost skills, inability to adapt to an environment. I don't know if that's a good analogy. And then I think people who are older have the willingness and ability to do outstanding work. So as far as the age issue, probably it didn't cross my mind, no.

The district court held that this proof was insufficient

to create a genuine issue of fact under the traditional scheme: "'[I]solated and ambiguous statements...are too abstract, in addition to being irrelevant and prejudicial, to support a finding of age discrimination.'" Memorandum Opinion at 11 (quoting *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F. 3d 542, 548-49 (4th Cir. 1995), *rev'd on other grounds*, 116 S. Ct. 1307 (1996) (internal quotations omitted)). We agree. The evidence cited indicates that Horney was cognizant of Burns's age, and associated it with deficiencies in her performance. But demotion based on performance does not violate the ADEA, even if the employer believes that the performance problems are age-related. For example, if a professional athlete loses his speed, his team will not have to keep him just because the coaches believe that the loss is attributable to age.

Nevertheless, evidence of the weakness of AAF-McQuay's nondiscriminatory reasons bolsters Burns's ambiguous affirmative proof. AAF-McQuay cited approximately eighteen incidents that allegedly motivated its demotion of Burns, but the district court found that Burns cast into doubt all but two -- "six to ten typographical errors ..., and the ... failure to schedule the arbitration meeting." A jury might find that those two incidents truly motivated AAF-McQuay's demotion of Burns, or it might disbelieve Burns's contradictory evidence and conclude that all eighteen incidents contributed to the decision. However, if the jury accepts

Burns's evidence contradicting sixteen of the eighteen incidents, and her proof that Horney made ambiguous comments about her age, it might reasonably conclude that AAF-McQuay used the two remaining incidents as a pretext for age-based discrimination.

B.

The district court acknowledged, and AAF-McQuay does not dispute, that Burns's demotion constituted an "unfavorable employment action." Thus, if prompted by an illegal motive, it would be compensable under the ADEA. The court rejected, however, Burns's contention "that the defendant's continued hostility toward the plaintiff coupled with the demoralizing effect of her reassignment forced her to resign her employment and thereby constitute[d] a 'constructive discharge.'" Memorandum Opinion at 7. To prove constructive discharge, the district court noted, a plaintiff mush show that the employer intended to induce the plaintiff to quit, *E.G., Bristow v. Daily Press, Inc.*, 770 F. 2d 1251, 1255 (4th Cir. 1985), *cert. denied,* 475 U.S. 1082 (1986). Moreover, the plaintiff must prove that "a reasonable person in the employee's position would have felt compelled to resign" by the employer's actions. *Id.*

The district court held that Burns failed under both prongs. Burns "assumed" that Horney intended her to resign, the court pointed out, from Horney's alleged arrogance, disrespect, unkindness, and hostility, even though other employees testified that Horney acted

arrogantly toward them, also. The court held that a jury could not reasonably make the same assumption.

On appeal, Burns attempts to distinguish Horney's treatment of her from his treatment of other employees. Her demotion itself, she argues, belies Horney's intent to force her out. Moreover, after Horney demoted her, he harassed her for reading the newspaper at the switchboard on her own time, criticized her for not opening the switchboard on time when she actually had opened it early, and inexplicably threatened to fire her one day upon her return from lunch.

We agree with Burns that AAF-McQuay has not presented evidence of equivalently offensive conduct by Horney toward other employees. However, even if Horney particularly disliked Burns, that alone does not support an inference that he intended to force her to resign.[17] The district court correctly determined, therefore, that Burns had failed to present sufficient evidence of constructive discharge.

Burns's affirmative evidence of discrimination is sufficient, when combined with evidence that AAF-McQuay's asserted reasons for demoting her were insubstantial, to create a genuine issue of material fact as to whether those reasons were a pretext for age-based discrimination. However, Burns has not presented

[17]Because Burns presented insufficient evidence that Horney intended to force her out, we need not address the tolerability of her working conditions.

sufficient evidence of constructive discharge. Consequently, we affirm the court's summary judgment on the question of constructive discharge, but reverse and remand a jury determination of whether the demotion violated the ADEA.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART

Supreme Court, U.S.
FILED
FEB 3 1997
CLERK

No. 96-1040

In The

Supreme Court of the United States

October Term, 1996

FRANCES D. BURNS,

Petitioner,

vs.

AAF-McQUAY, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the Fourth Circuit's decision that petitioner failed to proffer sufficient evidence that her voluntary resignation constituted a constructive discharge in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, based on petitioner's contention that the Fourth Circuit's decision conflicts with prior Fourth Circuit decisions and her assertion that the Fourth Circuit is without an effective test for evaluating constructive discharge claims.

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APPENDIX

Appendix A — Rule 40(b)(iii) of the Local Rules and Internal Operating Procedures of the Fourth Circuit 1a

Respondent AAF-McQuay, Inc. ("McQuay"), by counsel, requests the Court to deny the petition of Frances D. Burns for a writ of certiorari to review the September 23, 1996 judgment of the United States Court of Appeals for the Fourth Circuit remanding this matter for trial on the issue of whether petitioner was demoted in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"), but dismissing petitioner's claim that her voluntary resignation constitutes a constructive discharge.

STATEMENT OF THE CASE AND CORRECTION OF MISSTATEMENTS IN THE PETITION

On March 4, 1994, petitioner Frances D. Burns resigned her position as an employee of McQuay in its Staunton, Virginia facility. At the time of her resignation, petitioner was a receptionist/data entry operator. She had been transferred to that position in February, 1994. Prior to her transfer, petitioner had worked as secretary to McQuay's Human Resources Manager for approximately sixteen years; most recently for Stephen B. Horney, the current Manager of Human Resources at McQuay's Staunton facility.

Horney became the Manager of Human Resources at McQuay's Staunton, Virginia facility in November, 1992, and was petitioner's direct supervisor at all times relevant to this matter. At the time of petitioner's transfer to the switchboard, Horney was forty-six years of age and, therefore, a member of petitioner's protected group.

Soon after he arrived in Staunton, Horney discovered several problems with petitioner's performance as secretary to the Human Resources Manager. Horney testified that petitioner failed to perform organizational tasks (*e.g.*, she failed to make arrangements for an arbitration hearing in August, 1993), her

performance was inconsistent and, on several occasions, untimely, and she committed many errors. For example, petitioner was responsible for maintaining the Human Resource Department's files. On "numerous" occasions, however, Horney could not locate files, found materials misfiled, and discovered that file drawers and cabinets were mismarked.

Beginning soon after Horney arrived, petitioner committed typographical errors, and made mistakes in workers' compensation forms, union grievance forms, communications to the plant and general correspondence. Horney also testified that petitioner failed to prepare job postings in a timely manner (which was contrary to the terms of the collective bargaining agreement in force at the plant); failed to prepare employee status changes in a timely manner; and, refused Horney's specific instructions to reproduce certain departmental forms, to prepare employee identification badges on a daily basis, and to maintain the supply closet in an orderly manner.

Petitioner contends that, apart from her failure to make arrangements for the arbitration hearing in August, 1993 and a single typographical error, Horney never "expressed dissatisfaction with her performance." (*See* Petition for Writ of Certiorari ("Petition") at 4). Petitioner's assertion is belied by the record.

For example, petitioner misstates the record when she asserts that a December, 1993 is the "first and only specific instance of a typographical error that Horney can recall." (Petition at 4). Horney testified unequivocally that petitioner committed many errors and that, contrary to petitioner's attempt to mischaracterize his testimony, the August, 1993 incident in which petitioner failed to make arrangements for a union grievance hearing "was probably one of the last ones that more or less triggered [his] need to take actions." He testified that the

August, 1993 incident "might have been pretty close to the straw that broke the camel's back. . . ."[1]

In addition, although she asserts in her petition that Horney never "expressed any dissatisfaction with her performance" (Petition at 4), petitioner concedes that Horney told her in November, 1993 that her performance was "provisional" and she understood at that time that "provisional" was defined as "[b]elow average achievement which meets the minimum expectations of the position." Petitioner also concedes that Horney held meetings with her to discuss her performance deficiencies and acknowledged that the "conversations" she had with Horney regarding her performance "were negative."

Rather than terminate petitioner who was a long term employee, Horney transferred her to the switchboard where her weaknesses in typing, filing and organizational skills were less serious and her performance deficiencies would have less impact on the Human Resources Department. At the switchboard, petitioner's contact with Horney was lessened significantly. Petitioner's transfer did not reduce her pay, benefits or labor grade.

Petitioner's function as Human Resources secretary was filled by Donna Brown, a receptionist/data entry operator who had been employed by McQuay in various capacities since 1986. Brown was thirty-nine years of age at the time she swapped jobs with petitioner.

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1. Petitioner believes it is significant that "more than half of the alleged problems" with her performance purportedly were discovered after she was transferred to the switchboard or resigned. (Petition at 4, n. 4). Petitioner ignores the fact, however, that Horney's pre-transfer judgment regarding her performance was merely confirmed by the problems identified after petitioner was transferred to the receptionist position.

Throughout these proceedings, petitioner also has asserted that "employees at the Staunton facility expressed a not-so-subtle desire to remove Burns from her position as Human Resources secretary." (Petition at 5). In an attempt to support this claim, petitioner relies on the testimony of Gary Alderson and John Laub; both of whom were former supervisory employees at McQuay. Petitioner's position, however, is based on her own assumptions and speculation, and an incomplete description of the relevant, undisputed facts. (*See* Appendix to Petition for Writ of Certiorari ("Pet. App.") at 23-32).

Petitioner states, for example, that a former supervisory employee (Ira Luplow) opined to Gary Alderson, petitioner's former supervisor and Horney's predecessor, that "'he would like to get [petitioner] out of that position and get someone else in there younger." (Petition at 5). Petitioner, however, fails to inform the Court: (1) that Luplow did not occupy a position of authority over either Alderson or Horney; (2) that Alderson left the company before Horney was transferred to Staunton; (3) that Luplow made the alleged comment to Alderson ten months before Horney succeeded Alderson as Manager of Human Resources, twelve months before Horney began working full-time in Staunton, twenty-five months before petitioner was transferred to the switchboard, and twenty-six months before she quit her job; (4) that Luplow left his position at McQuay's Staunton facility five months before petitioner was transferred to the switchboard and six months before petitioner quit; and, (5) that it is undisputed that Luplow never made a comment to Horney regarding petitioner's age and that Luplow never repeated to Horney the statement he allegedly made to Alderson. There is, therefore, no nexus between Luplow's alleged statement and any of the employment decisions made by Horney.[2]

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2. Petitioner argued to the district court that a question exists regarding whether Horney may have been influenced by Luplow's alleged age-based

(Cont'd)

Petitioner also asserts that John Laub, a former managerial employee at McQuay, overheard a similar remark. (Petition at 5). After much confusion and contradictory testimony, Laub finally attributed the alleged remark to a former supervisory employee by the name of Paul Farris. (Pet. App. at 13). According to Laub, however, *if* Farris made the comment, he did so *after* both he and Laub had left the company; which was before Horney moved to Staunton and became petitioner's supervisor. (Pet. App. at 13 & n.3). The alleged remark, therefore, has no nexus to any adverse employment action allegedly suffered by petitioner. (Pet. App. at 13 & 23-28).[3]

(Cont'd)
animus against Burns and argued that a jury could find that Luplow talked to Horney about petitioner because they presumably talked to him about other matters. (Pet. App. at 27, n.10). According to the district court, however, it "is not possessed of the analytical dexterity to make an inferential leap of such magnitude," and petitioner's suggested "inference upon inference" is directly contradicted by Horney's undisputed testimony that Luplow never made any such statement to him. (Pet. App. at 27, n.10). Petitioner's "proffered evidence is strained, forced and contrary to both reason and the evidence presented in . . . this action." (Pet. App. at 25, n.9).

3. Petitioner also alleges that Horney and a co-worker made statements that revealed their "concern with her age. . . ." (Petition at 4-6). These alleged statements, however, are not evidence of age-based animus. The statements at issue are temporally remote, age-neutral or, in one instance, show a preference for older, more mature workers. Petitioner's view that the statements are based on McQuay's age-based animus towards her is pure conjecture and speculation. (Pet. App. at 30-32 & 50-52).

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S ALLEGATION THAT THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH PRIOR DECISIONS OF OTHER PANELS OF THE FOURTH CIRCUIT IS NOT A PROPER REASON FOR THE COURT TO GRANT A WRIT OF CERTIORARI.

Unless confronted with a "compelling reason," this Court wisely refuses to review judgments rendered by the courts of appeals. *See* Rule 10 of the Rules of the Supreme Court of the United States. Here, petitioner does not assert that any of the considerations apply which typically govern review on certiorari. Instead, petitioner alleges that the Fourth Circuit rendered a decision which conflicts with prior decisions of other panels of the Fourth Circuit.

A petition for writ of certiorari, however, is not the proper avenue of relief if petitioner believes the panel rendered a decision which is inconsistent with prior circuit precedent. Rather, a petition for rehearing to the court of appeals was the appropriate remedy if petitioner believed that the Fourth Circuit's decision was contrary to Fourth Circuit precedent. *See* Fed. R. App. P. 40. *See also* Local Rule 40(b)(iii) (reproduced at Appendix, *infra,* 1a). Here, despite the opportunity to do so, petitioner made no effort to avail herself of this potential avenue of review or relief. Her petition, therefore, should be denied.

II.

THE FOURTH CIRCUIT PROPERLY CONCLUDED THAT PETITIONER FAILED TO PRESENT SUFFICIENT EVIDENCE OF CONSTRUCTIVE DISCHARGE.

Moreover, contrary to petitioner's contention, the Fourth Circuit, consistent with its prior precedent, properly concluded that petitioner failed to proffer sufficient evidence of constructive discharge to prevent summary judgment. Her petition, therefore, should be denied.

As a threshold matter, petitioner asserts that the Fourth Circuit's dismissal of her constructive discharge claim is illogical because it remanded this matter for trial on the question of whether McQuay demoted petitioner in violation of the ADEA but affirmed the district court's finding that petitioner failed to prove constructive discharge. According to petitioner,

> [i]t is a logical conclusion that an employer who was motivated by illegal reasons in demoting an employee may have continued to be motivated by those same illegal reasons and acted upon them to force the employee out.

(Petition at 12). Petitioner's view, however, is pure speculation and ignores the well-settled principle that alleged unlawful discrimination alone cannot sustain a claim of constructive discharge. *See Jett v. Dallas Independent School Dist.*, 798 F.2d 748, 755 (5th Cir. 1986). If the rule were otherwise, any employee who resigned in the face of an adverse employment action (*e.g.*, demotion, failure to promote, etc.) would, in all instances, also state a claim for constructive discharge.

Instead, to establish constructive discharge, petitioner was required to produce evidence sufficient to show that McQuay intended her to quit and created intolerable working conditions to effectuate that intent. *See Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985). Petitioner was required to produce evidence sufficient to show that "a 'reasonable person' in the employee's position would have felt compelled to resign," *id.*; and that her working conditions were "intolerable in a discriminatory way." *Chambers v. American Trans Air, Inc.*, 17 F.3d 998, 1005 (7th Cir. 1994). Here, the Fourth Circuit correctly concluded that petitioner failed to present sufficient evidence that McQuay intended to force her from her job. (Pet. App. at 54).[4]

Petitioner apparently claims, for example, that McQuay's intent to force her to quit can be inferred because it failed to " 'act in the face of known intolerable conditions'. . . ." (Petition at 10, quoting, *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir. 1995)). Petitioner's transfer to the switchboard, however, does not support petitioner' suggested "inference".

Petitioner acknowledged, for example, that her job as secretary to the Human Resources Manager included relieving on the switchboard while the receptionist/data entry operator was on vacation or on break. Petitioner also never told her supervisor or anyone else in McQuay's management that working at the switchboard was demeaning or demoralizing. In addition, petitioner's pay, benefits and labor grade remained the same when she was transferred to the switchboard.

Furthermore, Horney told petitioner and Donna Brown, petitioner's replacement, that he would discharge Brown if she

4. She also failed to proffer sufficient evidence that her working conditions were so intolerable that a reasonable person would have felt compelled to resign. (Pet. App. at 17-20).

did not perform well as his secretary. Horney told Brown that she would be terminated if she did not perform well because petitioner had been transferred to Brown's former position. That petitioner's failure in the secretarial position resulted in a transfer, while Brown, who was thirty-nine years of age, was threatened with termination, demolishes petitioner's argument that Horney's attitude toward her was age motivated.[5]

Petitioner also contends that her voluntary resignation amounts to a constructive discharge because Horney "harassed" her while she was working at the switchboard. (Petition at 7 & 14). Petitioner asserts that Horney "chastised" her for reading the newspaper at the switchboard (Petition at 7); yet she acknowledged in her deposition testimony that reading the newspaper at the switchboard is not permitted. Petitioner also asserts that Horney "admonished" her for failing to open the switchboard by 7:00 a.m. (Petition at 7); yet she acknowledged in her deposition testimony that when Horney entered the plant that particular morning the switchboard was open and she was not at her post.[6]

Moreover, reasonable employees usually explore "alternative avenues thoroughly before coming to the conclusion that resignation is the only option." *Clowes v. Allegheny Valley Hosp.*, 991 F.2d 1159, 1161-62 (3rd Cir. 1993), citing, *Boze v. Branstetter*, 912 F.2d 801, 805 (5th Cir. 1990); *Garner v. Wal-*

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5. As noted above, petitioner "swapped" jobs with Donna Brown, the incumbent receptionist/data entry operator, who had been employed by McQuay in various positions for approximately eight years. Horney also was responsible for supervising the receptionist/data entry position.

6. Petitioner also contends that Horney "berated" her upon her return from lunch in front of two salesmen. (Petition at 7). As the district court noted, however, petitioner never stated why Horney allegedly "berated" her. (Pet. App. at 19-20).

Mart Stores, Inc., 807 F.2d 1536, 1539 (11th Cir. 1987). If necessary, the reasonable employee would have "filed an age discrimination claim with the EEOC while employed," *McKethan v. Texas Farm Bureau*, 996 F.2d 734, 741 (5th Cir. 1993); "[i]t is far better for all concerned to resolve the dispute while the employment relationship is ongoing." *Johnson v. Shalala*, 991 F.2d 126, 131 (4th Cir. 1993).

Here, however, prior to being transferred to the receptionist position, petitioner never asked Horney to change his alleged "arrogant attitude" toward her, and never reported to anyone at McQuay that she thought Horney was being unfair to her.

Petitioner also never attempted to report Horney's alleged "arrogant attitude" or harassment to Horney's supervisor. Petitioner asserts now that she "was unable to resolve the problem internally because the company had made Horney its EEO compliance officer. . . ." (Petition at 8). This assertion, however, does not account for her failure to report Horney's alleged conduct to anyone in McQuay's chain of command.

In addition, for the two months before she resigned petitioner was represented by counsel. She could and should have pursued her EEOC remedies before quitting and claiming constructive discharge. *See Brooms v. Regal Tube Co.*, 881 F.2d 412, 423 (7th Cir. 1989); *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 65-66 (5th Cir. 1980). In that way, the employment relationship may have been salvaged. Petitioner, however, resigned without giving "these remedies the opportunity to work." *Paroline v. Unisys Corp.*, 879 F.2d 100, 114 (4th Cir. 1989) (Wilkinson, J., dissenting), *vacated in part on rehearing en banc*, 900 F.2d 27 (4th Cir. 1990) (*en banc*) (adopting panel dissenting opinion). *Accord Shalala*, 991 F.2d at 131.[7]

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7. McQuay also submits that petitioner failed to proffer evidence sufficient to show that Horney treated her differently than he treated other

(Cont'd)

Based on the foregoing, the Fourth Circuit correctly concluded that petitioner failed to present evidence sufficient to lead a reasonable trier of fact to conclude that she was constructively discharged from her employment. (Pet. App. at 53-55). Therefore, as the Fourth Circuit concluded, petitioner cannot convert her decision to quit her job into a claim for constructive discharge under the ADEA.

III.

THIS COURT SHOULD REJECT PETITIONER'S INVITATION TO IMPOSE ON ALL FEDERAL COURTS THE FIFTH CIRCUIT'S MULTI-FACTOR TEST FOR EVALUATING CLAIMS OF CONSTRUCTIVE DISCHARGE.

Petitioner contends that the Fourth Circuit erred because it lacks "an objective framework for analyzing circumstantial evidence of constructive discharge" (Petition at 12) and that the

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(Cont'd)
employees. Petitioner asserts that one of her co-workers testified that Horney was "more critical" of petitioner than he was of other employees. (Petition at 6). Plaintiff, however, misstate the record. The co-worker merely speculated that it was "possible" that Horney was more critical of petitioner and that Horney "[m]ight have been" more critical of petitioner.

Moreover, according to petitioner's "rough" estimate, Horney displayed the same alleged arrogant attitude toward approximately ten or twelve other McQuay employees; some who are members of petitioner's protected class, others who are not. This evidence was undisputed, and rebuts any inference that Horney intended for her to resign; certainly he "did not wish to force all of [his] employees to resign." *Paroline*, 879 F.2d at 114, quoting, *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981). *See also Bristow*, 770 F.2d at 1255 (where employees are treated the same, "no particular employee can claim that difficult working conditions signify the employer's intent to force that individual to resign").

Court, therefore, should impose on the Fourth Circuit and its sister circuits the multi-factor test articulated by the Fifth Circuit for evaluating claims of constructive discharge. (Petition at 14-17, citing, *Barrow v. New Orleans Steamship Ass'n*, 10 F.3d 292 (5th Cir. 1994)). Petitioner opines that the Fifth Circuit's analysis in *Barrow* would "bring clarity and uniformity to constructive discharge law to all the circuits in employment discrimination actions." (Petition at 17). Petitioner's view is without merit.

Although petitioner asserts that her proffered multi-factor analysis will provide "uniformity" to the thirteen courts of appeals and the ninety-one judicial districts, in the three years since it was articulated, the *Barrow* test has not even brought "clarity and uniformity" to the courts of the Fifth Circuit. Compare *Blouin v. Kaiser Aluminum & Chem. Corp.* 1996 WL 19138 (E.D. La. 1996), *aff'd,* 103 F.3d 127 (5th Cir. 1996) (summary judgment for employer granted as to plaintiff's constructive discharge claim despite the fact that plaintiff was assigned to less lucrative shifts and subjected to multiple "incidents of harassment"); *Ellzey v. Espy,* 1995 WL 6277 (E.D. La. 1995) (summary judgment for employer denied as to plaintiff's constructive discharge claim because plaintiff reassigned to work under younger supervisor and to perform menial tasks); *Cargile v. Star Enterprise*, 872 F. Supp. 1514, 1517 (M.D. La. 1994) (summary judgment for employer granted as to plaintiff's constructive discharge claim despite the fact that plaintiff was deprived of all of his prior management responsibilities).

Perhaps this is why the *Barrow* court's multi-factor analysis has never been cited outside the Fifth Circuit. This may also explain why petitioner did not request the Fourth Circuit to adopt the Fifth Circuit's analysis in *Barrow*; an independent ground

for the denial of a writ of certiorari. *See Adickes v. S.H. Kress & Co.*, 90 S. Ct. 1598, 1602 n.2, 398 U.S. 144, 147 n.2 (1970).[8]

CONCLUSION

Based on the foregoing, the writ of certiorari should be denied.

Respectfully submitted,

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8. *EEOC v. Fed. Labor Relations Admin.*, 106 S. Ct. 1678, 476 U.S. 19 (1986) (absent exceptional circumstances, "[o]ur normal practice, from which we see no occasion to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals").

APPENDIX A — RULE 40(b)(iii) OF THE LOCAL RULES AND INTERNAL OPERATING PROCEDURES OF THE FOURTH CIRCUIT

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist:

i. A material factual or legal matter was overlooked in the decision.

ii. A change in the law occurred after the case was submitted and was overlooked by the panel.

iii. The opinion is in conflict with another decision of the Court or of another court of appeals and the conflict is not addressed in the opinion.